

- e. SWBT does not provide local dialing parity in accordance with the requirements of the Telecom Act;
- f. SWBT does not provide reciprocal compensation arrangements in accordance with the requirements of the Telecom Act;
- g. SWBT does not make telecommunications services available for resale in accordance with the requirements of the Telecom Act.
- h. Besides failing to satisfy numerous items of the competitive checklist, SBC's Application fails to meet the public interest test set forth in Section 271(d)(3)(C) of the Telecom Act. Specifically SBC has engaged in a significant level of anti-competitive conduct that has greatly restricted facilities-based competition in Missouri and has greatly restricted the competitive choices for Missouri consumers. As a result, SBC's Application should be denied.

V. SWBT HAS FAILED TO COMPLY WITH NUMEROUS COMPETITIVE CHECKLIST REQUIREMENTS

A. Section 271(c)(2)(B)

Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, and Fourth Report and Order, 14 FCC Rcd. 20902 ("Line Sharing Order")

In its evaluation of past Section 271 applications the FCC has mandated that an RBOC demonstrate that it “is providing” each of the offerings enumerated in the 14-point competitive checklist codified in Section 271(c)(2)(B).³²

In enacting the competitive checklist, Congress recognized that unless an RBOC has *fully* complied with the checklist, competition in the local market will not occur.³³ Thus SWBT must provide the FCC with “actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.”³⁴

The FCC has steadfastly held that applications under Section 271 should be granted only when the local market in a state has been fully and irreversibly opened to competition.³⁵ Furthermore, each and every checklist item is significant. The FCC has clearly indicated that failure to comply with even a *single* checklist item constitutes independent grounds for denying an application for 271 authority.³⁶ Thus, strict compliance with each requirement of Section 271 is necessary to ensure that sustainable competition will be realized in local markets. Compliance with the competitive checklist does not end the analysis, however. An RBOC must demonstrate that granting its application will serve the public interest, convenience and necessity.

³² See *Application of BellSouth Corporation, et. al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd. 539, ¶78 (1997) (citing *Ameritech Michigan Section 271 Order*, ¶110).

³³ *Ameritech Michigan Section 271 Order*, ¶18.

³⁴ *Id.*, ¶55.

³⁵ FCC Texas Order ¶417; FCC New York Order, ¶423.

³⁶ FCC Texas Order ¶418; FCC New York Order ¶424.

B. Checklist Item 1: Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)

To meet the required showing that it has “fully implemented” the competitive checklist under Section 271, the RBOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.³⁷ The Commission has determined that to comply with this standard, for those functions that are analogous to the functions a BOC provides itself, the BOC must provide access to competing carriers in, “substantially the same manner” as it provides itself.³⁸ The Commission has further specified that this standard requires an RBOC to provide access that is equal (*i.e.* substantially the same as) the level of access that the RBOC provides itself, its customer or its affiliates, in terms of quality, accuracy, and timeliness.³⁹

SWBT has failed to meet this checklist item in numerous ways.

1. SWBT Historically Has Provisioned Collocation in Missouri Under Terms and Pricing That Are Discriminatory and Anti-Competitive

For years SWBT provided collocation to CLECs in Missouri on an individual case basis (“ICB”) the correspondence of which was excessive pricing and onerous terms and conditions. As a result of SBC’s ICB approach in Missouri, CLECs have been presented with great uncertainty with respect to collocation provisioning intervals. This is despite the fact that in almost every other state RBOCs had either been required to file, or had voluntarily filed, collocation tariffs, and despite the fact that SBC had already filed collocation tariffs in Texas, Kansas and Oklahoma. Correspondingly, CLECs have been, and continue to be, placed unjustly at a competitive disadvantage in Missouri, as the

³⁷ *FCC New York Order*, ¶44.

³⁸ *Id.*

³⁹ *FCC New York Order*, citing *Ameritech Michigan Order*, 12 FCC Rcd. At 20618-19.

ability to predict collocation costs and provisioning intervals is extremely important to a CLEC's ability to make and implement business plans for market entry and expansion.

It was not until several months after SBC had filed its renewed 271 Application with the MPSC that SBC finally filed a proposed collocation tariff in Missouri. Up until that time, SBC had resisted efforts to file such a tariff. Indeed, on February 22, 2000, McLeodUSA along with several other petitioners filed with the MPSC a joint petition for a generic proceeding to require SBC to file a collocation tariff. SBC vigorously opposed this petition and on June 8, 2000 the MPSC dismissed the joint petition. On June 28, 2000 SBC filed its renewed application with the MPSC for 271 approval. On July 13, 2000 the MPSC granted the joint petitioner's motion for reconsideration and established docket for a generic proceeding to require SBC to file a collocation tariff. On October 24, 2000, SBC finally filed a collocation tariff with the MPSC (the "collocation tariff"). SBC's collocation tariff, however, remains in a state of flux.

As part of its Renewed Application before the MPSC, SWBT proposed in its original M2A the use of the Texas collocation tariffs as the basis for its collocation appendices. SWBT, however, in its original M2A altered numerous provisions contained in the Texas collocation tariffs in a way detrimental to CLECs, either through delay, increased costs, or inappropriate restrictions on collocation options.⁴⁰ Specifically, SWBT lengthened the time interval for delivering collocation space and performing augments, failed to include reserved space for its own use far in advance of that permitted in Texas, failed to submit cost studies to support the collocation rates it proposes in the M2A, failed to propose a process for interim approval pending commission review and

⁴⁰ See *Comments of Nextlink Missouri on SWBT's Proposed Missouri Interconnection Agreement*, MPSC Case No. TO-99-227, filed August 28, 2000 ("Nextlink Comments") p. 7.

has unilaterally reserved the right to alter terms and conditions.⁴¹ SWBT's collocation pricing contained in its original M2A was unreasonably and unjustifiably excessive.

The excessive pricing contained in the M2A is of particular concern not only for CLECs, but also for the staff of the MPSC ("Staff") as well.⁴² SWBT offered no legitimate, cost based rationale for the huge discrepancy between its T2A and M2A pricing.⁴³ SWBT's excessive ICB pricing essentially created a barrier to entry for CLECs wishing to enter or expand Missouri markets. As AT&T witness Steve Turner noted, "it's very difficult to enter a market when there are large numbers of unknowns as to how much it's going to cost you to build out a network, what it's going to cost you to order key components of that network from an unbundled standpoint."⁴⁴

Because the evidence presented to the MPSC overwhelmingly demonstrated that SBC's prices, terms and conditions for collocation were unreasonable and otherwise non-compliant with checklist item 1, the MPSC indicated that SBC's original M2A did not comply with checklist item 1 and recommended that SBC revise its M2A to conform with the T2A with respect to prices, and to conform to the K2A with respect to collocation terms and conditions.⁴⁵

Although SBC revised its original M2A as directed by the MPSC to conform with the applicable portions of the K2A and T2A with respect to collocation, SBC did not, however, so revise its collocation tariff previously filed on October 24, 2000. SBC's

⁴¹ *Id.* at 7-18.

⁴² Staff states in its Response to SWBT's Updated Record ("Staff's Response") pp. 7-10 that UNE prices contained in the M2A are considerably higher than the prices contained in the Texas collocation tariffs and offered by SWBT in other states. Staff also takes issue with SWBT's purported basis in arriving at its M2A prices.

⁴³ MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2254.

⁴⁴ *Id.* at 2298

⁴⁵ Interim Order regarding the Missouri Interconnection Agreement issued February 13, 2001, MPSC Case TO-99-227.

intentions with respect to collocation are clear. Agree to the Texas Interim Rates and the Kansas terms and conditions on an interim basis in order to receive a favorable recommendation from the MPSC (and, hopefully, 271 approval from the FCC) while simultaneously attempting to backslide from the interim rates, terms and conditions for collocation contained in the M2A by attempting to get approval for an inferior collocation tariff in the collocation tariff docket pending before the MPSC (TT-2001-298). Although the parties to that proceeding have recently settled most of the terms and conditions issues, SBC has just filed a revised collocation tariff on April 4, 2001 incorporating such resolved issues. More importantly, however, the price terms which will be contained in the collocation tariff have not been settled and await ruling by the MPSC after further testimony, a hearing and briefs.

2. SWBT Has Presented No Evidence Demonstrating Current Compliance with the Collocation Requirements of Checklist Item 1

There is currently no Missouri specific evidence indicating that SBC is in compliance with the collocation requirements contained in checklist item 1, other than SBC's interim agreement to adopt rates, terms and conditions from the T2A and K2A on an interim basis.

A track record of SBC's compliance with respect to collocation is still sorely lacking in Missouri. Staff concurs with the need for SWBT to establish a track record of collocation compliance in Missouri prior to Section 271 approval being granted:

Staff believes that regardless of what method is used to implement collocation (tariff or M2A), and regardless of what state the offering in Missouri may potentially be patterned after, the Staff fully supports the offer being in place for a period of time *before* this Commission makes its decision regarding approval of SWBT's Section 271 application.⁴⁶

⁴⁶ MPSC Case No. TO-99-227, *Staff's Response To Second Question and Answer Session, and to the Presentation of Earnst & Young*, filed Nov. 30, 2000, p.27.

A brand new tariff under which no competitor has operated provides virtually no evidentiary support for 271 purposes, as there is no demonstration that competitors are actually able to appropriately compete under the tariff.⁴⁷ As noted by AT&T, the unforeseen nature with which the issue of the single point of interconnection within the MCA arose demonstrates that “real world problems” often need time to gel before they manifest deficiencies in contract terms and conditions.⁴⁸ Perhaps no better evidence of such a situation is that of SWBT’s engaging in MCA call screening procedures and otherwise failing to recognize CLECs as MCA participants, despite the fact that it and the Commission had previously recognized CLECs as MCA participants in numerous orders approving interconnection agreements and tariffs.⁴⁹

As discussed in more detail *infra*, the record presented in this proceeding simply does not indicate that SWBT is providing collocation pricing based on TELRIC principles or that its collocation rates have ever conformed to TELRIC principles.

3. Interconnection Performance

The November Q&A Session before the MPSC demonstrates that interconnecting with SWBT is still very problematic for CLECs. Of great concern is SWBT’s extremely high missed due date rate for installing interconnection trunks. These rates are not at acceptable levels and, indeed, seem to be getting worse rather than improving. For example, in September, SWBT failed to install interconnection trunks in Kansas City at the rate of 30% and in St. Louis at the rate of 48.8%.⁵⁰

⁴⁷ MPSC Case No. TO-99-227, Transcript of Proceedings, pp. 2837-38.

⁴⁸ *Id.* at 3106.

⁴⁹ A full discussion of such orders and of SWBT’s initial acknowledgment of CLEC MCA participation is contained in *McLeodUSA’s Response to SWBT’s Updated Record* filed in MPSC Case No. TO-99-227 on August 28, 2000 at pp. 5-6.

⁵⁰ MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2945.

Evidence was also presented in Case No. TO-99-227 at the November Q&A Session before the MPSC indicating that SWBT has represented to CLECs that facilities were not available at a particular location, when in fact SWBT is advertising that it provides service in such location.⁵¹

Based on SWBT's actual collocation performance record, it is impossible to find that SWBT satisfies the collocation criteria required by Checklist item 1.

4. Single Point of Interconnection

SWBT's failure to provide CLECs with a single point of interconnection within a LATA continues to be a barrier for CLECs in Missouri. SWBT has revised the M2A creating a special definition of an exchange area for MCA purposes. This apparently resolves the single point of interconnection issue when the exchanges of both parties to a call are located inside the MCA. However, as drafted, the current M2A still requires CLECs to have a point of interconnection in every exchange that is outside of the MCA, contrary to the requirements of FCC rules.⁵²

SWBT's current M2A fails to provide a single point of interconnection as required by this Commission⁵³ and ensures that it will be virtually impossible for CLECs to serve many non-MCA markets in Missouri, by requiring CLECs to trunk directly to many exchanges where it is cost-prohibitive to do so.

⁵¹ *Id.* at 2977.

⁵² *Id.* at 3001.

⁵³ FCC First Report and Order ¶209

5. MCA Surcharge

As discussed more fully above SWBT recently engaged in conduct which violated the interconnection provisions of Section 251(c)(2) of the Telecom Act by engaging in the screening of CLEC MCA NXX prefixes, and by attempting to impose an unreasonable and illegal surcharge on CLECs wishing to avoid such screening practices.

C. Checklist Item 2: Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)

SWBT fails to provide nondiscriminatory access to network elements in numerous ways. SWBT's provisioning of collocation to CLECs as discussed in checklist item 1 above, also demonstrates SWBT's failure to provide CLECs, with nondiscriminatory access to unbundled network elements.

1. Operational Support Systems and UNE Provisioning

As a result of SWBT's conduct in screening CLEC MCA NXXs discussed above, SWBT erected a one and a half year barrier to entry for CLECs wishing to provide facilities-based service in Missouri MCA Plan markets. As a result McLeodUSA's experience with SWBT's operational support systems ("OSS") and provisioning of Unbundled Network Elements ("UNE") is somewhat limited. Nonetheless, it is clear to McLeodUSA from it's own direct experience with SWBT, and from the evidence presented by other CLECs, that SWBT has failed to demonstrate that its OSS and UNE provisioning passes muster.

Today, approximately 15-20% of McLeodUSA orders to SBC that are submitted and accepted through the automated LEX system are manually rejected by SBC's order writers without a valid reason.⁵⁴ SBC personnel have proven extremely uncooperative toward McLeodUSA in its efforts to obtain an explanation of the basis for the rejection.⁵⁵

⁵⁴ Schwartz affidavit, Exhibit A.

⁵⁵ Id.

McLeodUSA typically has to make several additional unsuccessful attempts at submitting the order to SBC until the order is finally escalated to an SBC manager.⁵⁶ Even more frustrating is the fact that the SBC manager typically accepts the order as first submitted by McLeodUSA, but not before McLeodUSA has experienced much delay and frustration in submitting the order.⁵⁷ Additionally, many order submitted correctly to SBC by McLeodUSA are incorrectly entered by SBC order writers.⁵⁸ This type of error occurs in approximately 15-20% of all orders submitted by McLeodUSA to SBC for one FB and UNE-P.⁵⁹ The impact to McLeodUSA and its customers is harmful. McLeodUSA's customers experience significant service impacting issues such as loss of features, loss of long distance access, along with the resulting delays occasioned by SBC requiring McLeodUSA to resubmit the order.⁶⁰ SBC also routinely fails to properly execute supplemental change order dates, such that when a new McLeodUSA customer seeks to change its cut-over date from SBC to a new date, SBC fails to recognize the change and cuts the customer's service on the original cut-over date, thus causing immense customer confusion and frustration for McLeodUSA's new customer.⁶¹ This problem happens on approximately 90% of all supplemental change order dates and causes huge competitive problems for McLeodUSA, as its new customer typically perceives this as a problem caused by McLeodUSA, when in fact it is solely the fault of SBC.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

Additionally, and as discussed more fully in McLeodUSA's filings in MPSC Case No. TO-99-227:⁶² A) SWBT failed to properly change McLeodUSA's operating company number, resulting in unreasonable protracted billing system problems for McLeodUSA; B) SWBT removed the One Plus Saver Direct product from the Telebranch lines of McLeodUSA's Telebranch customers, although SWBT anti-competitively retained the product for its own customers; and C) SWBT consistently provisions service faster to its own potential new customers than to McLeodUSA's potential new customers, resulting not only in customer frustration but lost business for McLeodUSA.

Although items A and B have been corrected, their existence and the length of time it took SWBT to take corrective measures indicates the inadequacy of its OSS. Item D continues to be a very significant problem for McLeodUSA. McLeodUSA estimates that SWBT's providing of service dates for its own potential customers faster than those provided to McLeodUSA's potential customers, results in customer losses for McLeodUSA of approximately 10 percent in Missouri SWBT markets.⁶³ Additionally, SWBT fails to meet firm order commitment dates for provisioning of service to McLeodUSA customers at a rate of approximately 30 percent. This of course results in significant customer confusion and frustration and additional loss of business for McLeodUSA.⁶⁴

Other CLECs operating in Missouri have encountered similar problems. The evidence presented clearly indicates that SWBT's operational support systems ("OSS") are not commercially ready. Significant problems exist pertaining to extraordinary and systemic problems during preordering and loop qualification, and SWBT consistently

⁶² MPSC Case No. TO-99-227, *Response of McLeodUSA to SWBT's Updated Record*, filed Aug. 30, 2000, pp. 16-18.

⁶³ Schwartz Affidavit, Exhibit A.

⁶⁴ *Id.*

misses deadlines for delivery of loops.⁶⁵ The high degree of manual handling by SWBT, along with the risk of error and delay associated with such manual handling, significantly and negatively impacts the ability of CLECs to compete in Missouri markets.⁶⁶

3. SBC Has Had a History of Excessive UNE Pricing in Missouri

SBC has had a history in Missouri of excessive UNE pricing that circumvents TELRIC principles and created barriers to entry for CLECs. A prime example is SBC's pricing for the provisioning of DSL-capable loops. SWBT's pricing for such loops essentially created a barrier to entry for CLECs desiring to provide advanced services in Missouri. The rates proposed by SWBT in its original M2A for conditioning loops in excess of 12,000 feet ranged from 10 to 40 times higher than the rates for the same service in Texas. The rate disparity between these Texas and Missouri rates is stunning. Removal of a repeater cost \$289.51 in Missouri as compared to \$10.82 in Texas. Removal of a bridge tap cost \$489.19 in Missouri compared to \$17.62 in Texas. Removal of a load coil cost \$727.20 in Missouri compared to \$35.06 in Texas.

As a result of these huge rate discrepancies it was virtually impossible for a CLEC to serve Missouri customers at locations more than 12,000 feet from the applicable central office. Thus, CLECs seeking to provide DSL service in Missouri were faced with a very real barrier to entry.

The Staff of the Missouri PSC found that "SWBT charges CLECs significantly more for collocation in Missouri than in Texas, Oklahoma or Kansas" and also found that SWBT's collocation rates constituted "a significant barrier to entry into the local market in Missouri."⁶⁷ Based on SWBT's history of anti-competitive ICB pricing in Missouri,

⁶⁵ MPSC Case No. TO-99-227, Transcript of Proceedings, pp. 2342-43.

⁶⁶ See MPSC Case No. TO-99-227, *AT&T Post Hearing Comments Proposed Findings and Recommended Steps To Compliance*, filed Oct. 26, 2000, pp. 27-31, and *Office of Public Counsel's Comments Regarding Q&A Session*, filed Oct. 26, 2000, pp. 7-8

⁶⁷ MPSC Case No. TO-99-227, *Staff's Comments* filed August 28, 2000, at p. 14.

Staff recommended that any collocation offering should be in “place for a period of time *before* the FCC makes its decision regarding approval of SWBT’s 271 application.”⁶⁸

3. SBC’s M2A Contains Excessive Rates and Far Too Many Interim Rates

As required by the MPSC, SBC’s current M2A contains three types of UNE rates:

1. Interim rates developed from case number TO-98-115;
2. Approximately 95 “orphan UNE rates” which had previously never been arbitrated in Missouri, to which the MPSC determined the Texas T2A rates should apply on an interim basis; and
3. Arbitrated rates from case number TO-97-40 arbitrated by the MPSC.

⁶⁸ MPSC Case No. TO-99-297, Staff’s Response to the Second Question and Answer Session, and to Presentation of Ernst & Young, filed Nov. 30, 2000, p.23.

The FCC has been presented with a much different situation regarding UNE pricing by SBC's application, than it has been faced with in any other 271 application. Virtually half of the rates for UNEs in the M2A are interim and many remain excessively high. The FCC has indicated that it would be willing to grant a section 271 application with a limited number of interim rates but at the same time stressed that it is clearly preferable to review a section 271 application on the basis of rates derived from a permanent rate proceeding.⁶⁹ The FCC also indicated that it would become more reluctant to continue approving section 271 applications containing interim rates as time passed and states had sufficient time to complete permanent rate proceedings.⁷⁰ The MPSC has had ample time to complete permanent rate proceedings concerning UNE pricing but has failed to do so and has otherwise failed to demonstrate an adherence to TELRIC pricing. Ninety-five of the UNE rates contained in the M2A have never been arbitrated at all. The UNE rates arbitrated by the MPSC in case number TO-98-115 have remained interim for over two years. In that proceeding, the MPSC conducted a hearing in November of 1997, and the case has been fully briefed since January of 1999, with virtually no activity since then.

The MPSC Staff noted that the rates set in case number TO-98-115 had been interim for over 2 ½ years, and recommended that the MPSC resolve these rates before issuing any recommendation on SBC's application.⁷¹ Staff also determined that the pricing for UNEs set in the Missouri arbitrations were higher in most categories than the prices in Texas, and higher in a number of categories than in Kansas or Oklahoma.⁷² Staff also found that there was "no evidence to explain the price differences between Missouri

⁶⁹ FCC New York at paragraph 260.

⁷⁰ *Id.*

⁷¹ MPSC Case No. TO-99-227, *Staff's Response to Southwestern Bell Telephone Company's Updated Record*, filed Aug. 28, 2000, at p.6

⁷² *Id.* at p. 7

and the other states” and concluded that such differences could demonstrate that Missouri’s arbitrated rates were not TELRIC based.⁷³

Many of the interim UNE rates from case number TO-98-115 (which are now part of SBC’s M2A, are excessively high.) For example the Missouri arbitrated rate for dark fiber cross connects is \$47.00 versus \$1.71 in Texas. The Missouri arbitrated rate for DS1 entrance facilities is \$162.30 (recurring) and \$471.00 (non-recurring) versus \$76.96 and \$73.25, respectively, in Texas. The approval of such high rates coupled with the failure to complete arbitrations on UNE rates suggest that the MPSC has not made a commitment (or, at the least, made it a priority) to establish permanent UNE rates according to TELRIC principles.

The MPSC recently established TO-2001-438 on February 25, 2001 to determine the recurring and non-recurring rates for UNEs. As a result it is not certain what the rates for half of the UNEs contained in SBC’s M2A will be, whether they will be established in accordance with TELRIC principles, or when they will be established. For this reason alone, the FCC should refrain from granting SBC 271 approval in Missouri until such time as the pricing set for UNEs is demonstrably brought into compliance with TELRIC and in compliance with FCC orders.

McLeodUSA concurs with the comments regarding UNE pricing submitted by PacWest Telecom, Inc. and EL Paso Networks, LLC., and by NuVox Communications in this proceeding.

4. Performance Measures and Remedies

Perhaps even more troubling than the problems caused by SWBT’s OSS, is SWBT’s attempts to avoid responsibility for such problems as demonstrated by its watering down of performance measures and remedies. SWBT’s performance remedy plan consists of two elements, performance measures and penalties. The primary purpose

⁷³ *Id.*

of a performance remedy plan is to prevent backsliding once an RBOC has received approval from the FCC to provide in-region interLATA service. Contrary to SWBT's professed desire to do in Missouri what it did in Texas, with respect to performance measures and remedies, SWBT has once again made major changes in its M2A from that proposed in the T2A. SWBT has proposed to drastically reduce the penalty provisions for failing to meet performance measure requirements, and fails to include the proper amount of disincentives to prevent anti-competitive conduct. The per occurrence structure of SWBT's remedy plan together with its proposed very low liquidated damages sanctions fails to provide meaningful deterrence to SWBT to engage in anti-competitive conduct and most certainly will not adequately compensate CLECs damaged by such conduct. SWBT's remedy plan for Missouri does little more than to help insure that SWBT maintains its monopoly control of Missouri markets. As such, SWBT's performance measures and remedy plan are clearly not in the public interest, and certainly do not demonstrate a competitive environment that is irrevocably open.

5. Potential Improper "Special Construction" Charges

Due to the delay in initiating facilities-based services in Missouri caused by SWBT's anticompetitive MCA practices, there are other potential areas of discriminatory access that McLeodUSA expects to encounter in Missouri as its facilities-based offering grows. One of those is SBC's practice of imposing discriminatory construction charges on CLECs when SBC claims there are no spare copper loop facilities available to provision a loop to an end user. Given the small number of UNE-L orders submitted by McLeodUSA to date in Missouri, such charges have not yet been experienced. However, McLeodUSA understands that SWBT uses the bona fide request ("BFR") process to provision loops in such circumstances. It was Ameritech's reliance on the BFR process that was first challenged by CLECs in Michigan. After rulings in Michigan and Illinois that Ameritech's practice was unlawful, SBC-Ameritech unilaterally modified its policy to eliminate use of the BFR process, but still attempted to impose

special construction charges through other processes. State regulators in Illinois, Ohio and Indiana have continued to reach the conclusion that assessing construction charges to CLECs to provision UNE loops is unlawfully discriminatory under the Telecom Act. The fact that McLeodUSA has no similar experience in Missouri to date is of no comfort. It took over two years of attempting to provide facilities services in Michigan, Illinois and Indiana before this issue came to light. Again, this experience speaks volumes about the need to have an actual track record of competition before considering an RBOC application for 271 approval.

D. Checklist Item 3: Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

E. Checklist Item 4: Local loop transmission from the central office to the customer's premises, unbundled from switching or other services.

1. Line Sharing and Line Splitting

SWBT has failed to submit sufficient evidence that it provides line sharing in a nondiscriminatory basis in Missouri. SWBT's October performance reports indicate that it has provisioned virtually no line sharing to Missouri CLECs. Furthermore SWBT's past history regarding the terms upon which SWBT proposes to offer line sharing under the M2A "cause barriers and cause increased costs and delay and provisioning problems."⁷⁴ For example SWBT's original M2A prevents a data CLEC from line splitting with a UNE-P CLEC, and discriminates against voice CLECs by preventing a data CLEC from using SWBT splitters, cross-connects, equipment or OSS, if such voice

⁷⁴ MPSC Case No. TO-99-227, Transcript of Proceedings, p. 3080.

CLEC wishes to provide voice service. (Section 4.11.5.) Such discriminatory terms were not included in the Texas interim terms. SWBT's refusal to provide CLECs who provide voice service via UNE-P with access to SWBT deployed splitters (though it provides data CLECs with same) inhibits such CLECs ability to use the full functionality of the loop, and to deliver advanced service to voice customers:

2. This discriminatory limitation on access to the splitter will severely limit the
3.number of CLECs with whom a UNE-P provider can partner to offer advanced services, because many rely on the SWBT-deployed provider. In turn, this practice will inhibit competition for voice service using UNE combinations, because UNE-P entrants will be constrained in their ability to win voice customers who demand advanced services.⁷⁵

4. It is still unclear given the Line Sharing Docket pending before the MPSC (TO-2001-440) as to what the prices terms and conditions for line-sharing and line-splitting will be in Missouri.

F. Checklist Item 5: Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

G. Checklist Item 6: Local switching unbundled from transport, local loop transmission, or other services.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

⁷⁵ MPSC Case No. TO-99-227, *AT&T Comments to November Q & A Session*, filed Nov. 30, 2000, p. 28.

- H. Checklist Item 7: Nondiscriminatory access to: (I) 911 and E911 services; (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (III) operator call completion services.**

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

- I. Checklist Item 8: White pages directory listings for customers of the other carrier's telephone exchange service.**

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

- J. Checklist Item 9: Nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers.**

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

- K. Checklist Item 10: Nondiscriminatory access to database and associated signaling necessary for call routing and completion.**

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

- L. Checklist Item 11: Telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible.**

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SWBT has met its burden of establishing compliance with this checklist item.

- M. Checklist Item 12: Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).**

As discussed more fully above, SWBT has not been in compliance with this checklist item by programming its switches to treat calls from its own MCA subscribers

to CLEC MCA subscribers as toll calls. By doing this SWBT imposed toll charges and one-plus ten digit dialing based solely on the fact that the called party selected a competitive local exchange carrier to provide service. The fact that SWBT is purportedly reprogramming its switches in an effort to cease its screening of CLEC MCA NXX prefixes after having been ordered to do so by the MPSC, does not erase the fact that SWBT willingly engaged in this conduct in the first place, and ceased to do so only after being so ordered by the MPSC. The fact also remains that SWBT has still not complied with the MPSC's order in the MCA case and is still failing to properly recognize CLEC MCA subscribers who receive facilities-based service as MCA participants.

N. Checklist Item 13: Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)

As discussed above, SWBT's attempt to impose a 2.6 cent per minute MCA surcharge as a condition of allowing CLECs to participate in the MCA plan violates the reciprocal compensation requirements of Section 252 (d)(2) of the Telecom Act and demonstrates a recent past failure to comply with this checklist item. Additionally, the MPSC in its September 2000 MCA Report and Order mandated the use of bill and keep inter-company compensation for all MCA traffic, thereby requiring the unilateral rewriting of previously negotiated interconnection agreements which provided for reciprocal compensation.

O. Checklist Item 14: Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

As discussed more fully above, SWBT consistently fails to meet firm order commitment dates for the turn-up of service to McLeodUSA resale customers and consistently provisions service faster to its own customers than to McLeodUSA customers.

As this Commission may know, McLeodUSA's initial entry into many of its markets was through the resale of Centrex services. In many states, this entry was resisted by RBOCs who either maintained, or attempted to institute, restrictions on the resale of such Centrex services. Typically, these restrictions would prohibit the resale of the service to "unaffiliated" end users, or to end users on "non-contiguous property," with the result being the inability of a reseller to aggregate users in multiple locations into a single Centrex system.

The Commission dealt with this issue for SWBT several years ago, when it preempted an attempt to impose similar limits on the resale of SWBT's Centrex service in Texas.⁷⁶ Despite this holding and despite SWBT's promises in an earlier 271 related docket before the Missouri PSC to eliminate its restriction on Centrex resale consistent with the FCC's Texas preemption ruling, SWBT continues to maintain a restriction on resale in its Missouri tariffs regarding "Plexar-Custom" service. That tariff provides that the "Use of Plexar-Custom Service for other than administrative stations by the customer of record is prohibited."⁷⁷ As long as SWBT continues to maintain this tariff provision in Missouri, it cannot meet the requirements of Checklist Item #14.

VI. Performance Measurements

The evidence presented in this case demonstrates that SWBT's operations support systems ("OSS") and provisioning of resale and UNE service is not sufficient and adversely affects the ability of CLECs to compete. The performance data presented demonstrates that in many areas SWBT's performance is substandard, continuing, and in some cases deteriorating. The performance data highlights the need for SWBT to

⁷⁶ Public Utility Commission of Texas, CCB Pol 96-13 et al., FCC 97-346, 9 CR (P&F) 958 (released Oct. 1, 1997).

⁷⁷ P.S.C. Mo-No. 35, General Exchange Tariff, Section 33, 3rd Revised Sheet 34.01.

demonstrate an adequate track record of compliance under an adequate M2A for a sustained period of time.

A. SWBT's Performance in Missouri Fails To Demonstrate Checklist Compliance

As noted by Staff, SWBT's level of performance in Missouri is the lowest among the five state SWBT region; Missouri has experienced lower performance in terms of successfully meeting PM objectives. In addition, the Missouri specific results indicate SWBT's performance has remained low in comparison to the other state results, and has even declined.⁷⁸

In fact SWBT's overall success ratio for Missouri has dropped to 82.5 percent in the months of August, September and October of this year.⁷⁹ The evidence clearly demonstrates that SWBT has failed to comply with a number of crucial performance measurements including the following:

PM 1-12 (average pre-order response time-EDI protocol translation time)

PM 2-08 (pre-order response time-actual loop makeup data requested and returned)

PM 2-16 (pre-order response time-dispatch required-variegate)

PM 7.1-01, 7.1-02 (percentage of mechanized completions returned within one day of work completion)

PM 7.1-02 (percentage of mechanized completions returned within one day-EDI)

PM 10.1 (percentage of manual rejects received electronically and returned within X hours)

PM 10.1-01 (percentage of manual rejects received electronically and returned within five hours)

⁷⁸ Staff's response to the Second Question and Answer Session, and to presentation of Ernst and Young filed November 30, 2000, in Case No. TO-99-227, p.11.

⁷⁹ Id. at 12

PM 10.2-02 (percentage of orders that receive SWBT-caused jeopardy notifications)

PM 13-02 (order process percentage flow-through-LEX)

PM 17-01 (Billing completeness)

PM 28-07, 28-08, 28-09, 28-10 (percentage of resale UNE-P installations confirmed within the customer requested due date) (this performance measure continues to show that CLECs are not receiving the requested due date a substantial percentage of the time)

PM 29-03, 29-06 (percentage of SWBT-caused missed due dates)

PM 35-12 (percentage of trouble reports within ten days of installation-UNE-C orders-no field work)

PM 38-05 (percentage of missed repair commitments-UNEs-dispatch)

PM 43-07 (average installation interval-ISDN/PRI)

PM 58-09 (percentage of SWBT caused missed due dates-DSL)

PM 59-08 (percentage of trouble reports within thirty days of installation-DSL-no line sharing)

PM 60-03 (percentage of missed due dates due to lack of facilities-BRI Loop)

PM 62-09 (average delay days for SWBT missed due dates-DSL)

PM 65-08 (trouble report rate-DSL-no line sharing)

B. The Remedy Plan Contained in the M2A Is Woefully Insufficient To Protect Against Backsliding and Fails To Recognize SWBT's History of Anti-competitive Conduct In Missouri

1. Introduction.

To ensure that SWBT's monopoly controlled local exchanges are irreversibly opened to facilitate development of effective local competition, an effective backsliding mechanism must be in place to prevent SWBT's service quality to CLECs from

deteriorating after being granted 271 relief. McLeodUSA strongly believes that SWBT's proposed backsliding mechanism, the Texas Remedy Plan ("TRP"), to use in Missouri is fundamentally flawed in meeting this criteria for several reasons.

2. The TRP lacks the necessary "teeth" to compel SWBT to provide adequate service to CLECs.

a. Penalty amounts.

The penalties that SWBT is subject to under the TRP are relatively minimal. Indeed, in an Illinois Commerce Commission public meeting on service quality, an SBC representative acknowledged that such remedy plan assessments are merely the cost of doing business. The fact that SBC holds this view of the performance remedies means that SWBT's poor performance that harms competition may be viewed internally by SBC as a cost effective decision in comparison to losing customers to competitors if its performance were adequate. A remedy plan that fosters that kind of attitude towards wholesale performance by an RBOC is a remedy that will doom competition. McLeodUSA believes that the TRP will not foster development of competition in Missouri. This is especially important since, as noted elsewhere in these comments, there is virtually no facilities-based competition in Missouri today due to SWBT's anticompetitive MCA actions.

Additionally, remedies should be based on the expected financial gain to SWBT from impeding competition by providing sub-standard service to CLECs. A review threshold for total remedies should be set no less than the FCC's recommendation of 36 percent of "Net Revenue," or \$126,036,360 for SWBT (see Table 1 below for calculations). However, in light of the post-271 remedial actions of the FCC and New York Public Service Commission that raised the penalties for which Bell Atlantic New York was subject to, McLeodUSA recommends an initial review threshold of 44 percent or \$154,044,440 per year. If a remedy cap is established exceeding the review threshold,

its value should be based on an economic and financial analysis of the expected financial gain to SWBT from deterring competition, adjusted for the probability of detection and punishment inherent in the performance plan. A remedy plan should not contain an absolute remedy cap because the cap reduces the effectiveness of the remedy plan with no offsetting benefits. Indeed, a cap enables SWBT to calculate its total liability, encouraging it to maintain its perception that remedies should be viewed as a cost of business to maintain monopoly power. Other state commissions have recognized this fault of remedy plans like the TRP. For example, the Michigan PSC recently stated that there was no valid reason to place a cap.⁸⁰

3. The TRP fails to deter anti-competitive conduct.

Several features of the TRP restrict SWBT's exposure to liquidated damages and penalties to a level that cannot be expected to deter conduct that is discriminatory or denies CLECs a meaningful opportunity to compete. Those same limitations mean that the TRP will not adequately compensate McLeodUSA when they are injured by such conduct. While the McLeodUSA takes exception to the annual cap on liability, their primary concern is with other features of the plan that virtually ensure that SWBT never will approach that cap, despite poor wholesale performance. As the FCC has said, "it is important to assess whether liability under an enforcement mechanism . . . would actually accrue at meaningful and significant levels when performance standards are missed. Indeed, an overall liability amount would be meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread performance failure." *Bell Atlantic New York* ¶ 437.

The TRP fails this test in many ways. Some examples: its calculation of damages and penalties based on volume of CLEC transactions ("per occurrence"); its classification of important measures as "low" so that very small damages multipliers apply; its

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April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 9